

STATE OF MICHIGAN  
IN THE SUPREME COURT

Bank of America, N.A.,

Plaintiff/ Appellant

v.

Supreme Court No.: 149599

Court of Appeals No.: 307756

First American Title Insurance Company;  
Patriot Title Agency, LLC; Kirk D. Schieb;  
Westminster Abstract Company doing  
business as Westminster Title Agency, Inc.;  
The Prime Financial Group, Inc.; Valentino  
M. Trabucchi; Pamela S. Notturmo, formerly  
known as Pamela S. Siira; Douglas K. Smith;  
Joshua J. Griggs; Nathan B. Hogan; State  
Value Appraisals LLC, and Christine D.  
Mays,

Defendants/Appellees,

and

Fred Matson, Michael Lynett, Jo Kay James,  
and Paul Smith,

Third-party Defendants.

Richard J. Landau (P42223)  
Christopher A. Merritt (P70924)  
**RJ LANDAU PARTNERS PLLC**  
Attorneys for Plaintiff Bank of America, N.A.  
5340 Plymouth Road, Suite 200  
Ann Arbor, Michigan 48105  
Phone: (734) 865-1585  
Fax: (734) 865-1595

Steven M. Ribiat (P45161)  
**BROOKS WILKINS SHARKEY & TURCO,  
PLLC**  
Attorneys for Defendant First American  
Title Insurance Company  
41000 Woodward Avenue  
Bloomfield Hills, Michigan 48304  
Phone: (248) 258-1439

Charles D. Price  
Jeffrey T. Heintz  
Lucas M. Blower  
**BROUSE MCDOWELL, L.P.A.**  
Co-Counsel for Defendant, First  
American Title Insurance Company  
600 Superior Avenue East, Suite 1400  
Cleveland, OH 44114-1151

ORIGINAL

FILED

SEP 9 2014

---

John R. Monnich (P23793)  
OTTENWESS TAWHEEL & SCHENK PLC  
535 Griswold St Ste 850  
Detroit, MI 48226  
Phone: (313) 965-2121

---

**REPLY BRIEF OF PLAINTIFF BANK OF AMERICA, N.A. IN RESPONSE TO  
WESTMINSTER ABSTRACT COMPANY D/B/A WESTMINSTER TITLE AGENCY'S  
RESPONSE TO APPLICATION FOR LEAVE TO APPEAL**

## TABLE OF CONTENTS

<u>INDEX OF AUTHORITIES</u> .....	iv
<u>INDEX OF EXHIBITS</u> .....	v
Introduction.....	1
Argument.....	2
A. The Court should disregard Westminster's immaterial, impertinent, and scandalous discussion of unrelated <i>allegations</i> related to mortgage-backed securities .....	2
B. Westminster's unfounded critiques of the Bank's underwriting do not alter Defendants' liability or provide just reason to deny the Bank's application for leave to appeal .....	6
C. The Court of Appeals disregarded the gatekeeper function of closing agents.....	9
D. There are genuine issues of material fact as to whether Westminster (1) failed to comply with the Bank's closing instructions and (2) closed the transactions with "fraud or dishonesty." .....	10

## INDEX OF AUTHORITIES

### **Cases**

<i>FDIC v Attorneys' Title Insurance Fund, Inc.</i> , Case No 12-23599 (SD Fla Sept 3, 2014).....	7
<i>FDIC v First Am Title Ins Co</i> , 2011 US Dist LEXIS 94842 (CD Cal August 24, 2011).....	8
<i>FDIC v Property Transfer Services, Inc.</i> , 2013 US Dist LEXIS 144663 (SD Fla Oct 4, 2013).....	9
<i>Fifth Third Mortgage Co v Chicago Title Ins Co</i> , 758 F Supp 2d 476 (SD. Ohio 2010).....	6, 9
<i>Fifth Third Mortgage Co v Chicago Title Ins Co</i> , 692 F3d 507 (CA 6, 2012).....	6
<i>Holton v A+ Ins Assocs</i> , 255 Mich App 318, 661 NW2d 248 (2003) .....	6
<i>In re Holmes</i> , 414 BR 115 (ED Mich 2009).....	8, 9
<i>JPMorgan Chase Bank, NA v First Am Title Ins Co</i> , 795 F Supp 2d 624 (ED Mich 2011) aff'd 750 F3d 573 (6 CA, 2014).....	7, 8
<i>Lawyers Title Ins Corp v New Freedom Mortgage Corp</i> , 285 Ga App 22; 645 SE2d 536 (2007).....	7
<i>New Freedom Mortgage Corp v Globe Mortgage Corp</i> , 281 Mich App 63; 761 NW2d 832 (2008).....	2
<i>People v Johnson</i> , 474 Mich 96, 101; 712 NW2d 703 (2006).....	7
<i>Romain v Frankenmuth Mut Ins Co</i> , 483 Mich 18, 21-22; 762 NW2d 911 (2009).....	8
<i>Rose v Nat'l Auction Group</i> , 466 Mich 453; 646 NW2d 455 (2002).....	4
<i>Silva v OneWest Bank, FSB</i> , 27 Mass L Rep 61 (Super Ct 2010).....	9

### **Statutes and rules**

MCR 7.302(B).....	1
-------------------	---

### **Other Authorities**

2 Windt, <i>Insurance Claims and Disputes</i> §11:22A (5th ed 2007).....	7
Gosdin, <i>Title Insurance: A Comprehensive Overview</i> 89 (3rd ed, 2007).....	7

### **INDEX OF EXHIBITS**

**Exhibit 17:** 2 Windt, Insurance Claims and Disputes §11:22A (5th ed 2007)

**Exhibit 18:** *FDIC v First Am Title Ins Co*, 2011 US Dist LEXIS 94842 (CD Cal August 24, 2011)

**Exhibit 19:** Stated Income Guidelines

**Exhibit 20:** *FDIC v Property Transfer Services, Inc*, 2013 US Dist LEXIS 144663 (SD Fla Oct 4, 2013)

**Exhibit 21:** Testimony of Frank Pellegrini on behalf of The American Land Title Association, June 18, 2009

## I. Introduction

Closing instructions and closing protection letters (CPLs) perform vital functions in Michigan real estate transactions; not only do these separate contracts help detect and deter mortgage fraud, they spread the risk of losses which would otherwise be born solely by the lender and borrower. This appeal concerns the rights of lenders like Bank of America to enforce the terms of these customary contracts against third party closing agents and title insurers. As closing agent for two of the subject transactions, Westminster Title Agency, Inc.'s contractual obligations to the Bank are spelled out in contracts titled "Lender's Closing Instructions." These closing instructions, however, are barely mentioned in Westminster's response,<sup>1</sup> and Westminster continues to confuse the nature of the claims against it.

The Bank's claim against Westminster for breach of the closing instructions is completely separate from the Bank's claim against First American Title Insurance Company (an unrelated third party) for breach of the separate CPL contracts. The Bank has never argued that Westminster is liable to the Bank under the CPLs issued by First American. The cause of the confusion by Westminster is First American's cross claim alleging that Westminster is obligated to indemnify First American for any amounts First American is ordered to pay under the CPLs. (First American Answer, ¶¶ 159, 166.) Westminster thus has been forced to defend both the breach of closing instructions claims (against Westminster) and the breach of CPL claims (against First American), but the fact remains that these are completely distinct claims.

The Bank seeks leave to appeal under MCR 7.302(B)(3) and (5) as this appeal involves legal principles of major significance to Michigan's jurisprudence and the Court of Appeals' decision was clearly erroneous and will cause material injustice to those injured by mortgage

---

<sup>1</sup> Westminster presented six counter-questions for review, and none of those questions deal directly with the Bank's closing instructions. (Resp, p iii-v.)

fraud. Instead of responding to these valid grounds for appeal, Westminster's response is almost entirely devoted to its unfounded and spurious criticisms of the Bank's underwriting. According to Westminster, no lender that funded stated income loans or sold mortgage-backed securities should be allowed to enforce its contracts with third parties. While expedient for Westminster's purposes of avoiding its clear liability, this argument has no support in law or fact.

Westminster readily admits that the subject mortgage loan transactions were fraudulent; it merely contends that Westminster should bear no responsibility (either directly through the closing instructions or indirectly through the CPLs) because the fraud happened "before" Westminster closed the transactions. But this is a flawed interpretation of Michigan law that disregards the important duties of a closing agent. Rather, the jury here would be required to determine (1) if the Bank's losses resulted from Westminster's failure to comply with any of the Bank's closing instructions – thereby triggering Westminster's direct liability under Count III of the Bank's complaint or (2) if the Bank's losses "arise from" the "fraud or dishonesty" of Westminster – thereby triggering First American's direct liability under Count I of the Bank's complaint.<sup>2</sup>

**A. The Court should disregard Westminster's immaterial, impertinent, and scandalous discussion of unrelated *allegations* related to mortgage-backed securities.**

---

<sup>2</sup> Westminster largely relied on First American for purposes of responding to the Bank's arguments regarding the full credit bid rule. (Resp, p 24-25.) Briefly, Westminster's statement that it is "logical" to apply the discharge of debt to everyone misses the distinction between claims under the debt and claims against third parties unrelated to the debt. (Resp, p 25.) Further, the statement that the Bank "will succeed against the obvious wrongdoers without any change in the law" is simply not true. (Resp, p 19.) Under *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63; 761 NW2d 832 (2008), the Bank could not succeed in its claims against anyone – no matter how "obvious" the wrongdoing.

Quite simply, there is absolutely no evidence (direct or circumstantial) that the subject mortgages were ever sold by the Bank to investors. In fact, the Bank's sworn answers to Westminster's interrogatories state that the Bank owned the Enid and Heron Ridge loans at all times.<sup>3</sup> (Reply to Westminster Br on Appeal, ex 4, Answers 9 and 14.) Despite this, Westminster claims that the Bank "came out of these fraudulent mortgages pretty well and it was the investors who bought these mortgages, bundled as negotiable securities." (Resp, p 1, 7.) This is pure fiction:<sup>4</sup> the Bank, and the Bank alone, suffered the substantial losses on these loans.

Westminster, however, blatantly distorts the facts of this case in order to support a seriously flawed argument. Namely, that the Bank does not "deserve" to have its appeal heard by this Court (and, by extension, its closing instructions or CPLs enforced) because (according to Westminster) the Bank's underwriting was negligent.<sup>5</sup> (Resp, p iii (II. Does the Bank "possess a strong enough equitable position to be granted leave in this case?") and 25 ("Is BOA in a position where it is supported by equities compelling enough to induce this Court to grant leave or is it one of the usual suspects?") Essentially, Westminster contends that the Bank's application

---

<sup>3</sup> Because the Bank retained the risk of default, it had a strong incentive to ensure that the loans were not fraudulent. (See Ex. D to Resp, ¶ 32.)

<sup>4</sup> Westminster's response is largely devoid of citations to the record. Westminster further makes no attempt to fairly state both the facts without argument or bias. Instead, Westminster's brief is essentially twenty-five pages of stream of consciousness dictation that is unsupported by the facts in this case. For instance, in addition to the spurious claims regarding mortgage-backed securities, Westminster's claim that it remained the Bank's "primary closing agent" after the Bank's investigation into these frauds is unsupported by any evidence. (Resp, p 2.)

<sup>5</sup> Westminster first suggested that the Bank's underwriting was negligent in response to the Bank's motion for reconsideration of the Circuit Court's order granting Westminster's motion for *partial* summary disposition. (App'x 3, pp 5-7.) Westminster's motion for summary disposition simply suggested that the Bank's underwriting would be "an interesting question" for the jury. (App'x 12, p 6.) This germ of an ill-considered argument has blossomed into Westminster's response to this Court that it was the Bank (and not Westminster) that got "a break" from the Court of Appeals' dismissal of the Bank's breach of closing instructions claim against Westminster. (Resp, p 23.)

should be denied under the clean hands doctrine because of the Bank's lending practices in 2006 and 2007. (Resp, p 6.) But the clean hands doctrine is only relevant in equitable actions, and the Bank's claims at issue in this appeal are for breach of contract. See *Rose v Nat'l Auction Group*, 466 Mich 453, 468; 646 NW2d 455 (2002). Further, Westminster's self-serving indictment of the lending practices prevalent in 2006-2007 is irrelevant to the issues in this appeal.<sup>6</sup>

Westminster first cites to *allegations* made against the Bank relating to mortgage-backed securities in order to suggest that every loan funded by the Bank during 2006 and 2007 was a bad loan.<sup>7</sup> (Resp, p 6-10.) But these allegations are plainly irrelevant because it is undisputed that the subject loans were not sold to investors.<sup>8</sup> Despite Westminster's strained efforts to tie these allegations to the subject loans, the allegations provide absolutely no support for Westminster's argument that the Bank was negligent in underwriting the subject loans.<sup>9</sup>

Westminster relies heavily on the allegations made by the United States in civil litigation filed in 2013.<sup>10</sup> (Resp, p 8-10.) But these allegations relate solely to a mortgage-backed security sold in 2008 consisting of loans originated in late 2007 (at least a year after the mortgages in this case). (Ex. D to Resp, ¶¶ 2, 6.) Arguing that it does not take a "detective" to correlate these

---

<sup>6</sup> Westminster, of course, made a lucrative business off this "hot" market. (App'x 3, p 7.) And as explained in the Bank's application, it is not just the Bank that will suffer material injustice as a result of the rulings by the Court of Appeals. Nor are the rulings by the Court of Appeals constrained to this period of what Westminster now claims was a period of "reckless lending."

<sup>7</sup> The Golf Ridge and Enid loans were funded in 2005.

<sup>8</sup> If this Court were to remand this matter, allegations in these unrelated matters would clearly be ruled inadmissible evidence under MRE 402, 403, and 404.

<sup>9</sup> Westminster cites to a complaint by AIG, but concedes the complaint could be considered a suit from a disgruntled investor. (Resp, p 7-8.) In selectively quoting from this complaint (of which Westminster attaches two of the 187 pages), Westminster refers to "Defendants" as "BOA." This is misleading as the majority of the complaint concerned securities sold by Countrywide and Merrill Lynch prior to any relationship with the Bank. The parties have settled this litigation, and there was no finding that the allegations were true.

<sup>10</sup> These allegations were never proven. A settlement was reached as to this and related litigation in August 2014.

allegations to the Enid and Heron Ridge loans (indeed, it would take a magician), Westminster proceeds to make a number of flawed and inaccurate analogies. For instance, Westminster cites to the allegation regarding “Loan Level Diligence” for the proposition that the Bank was supposed to audit the subject loans. (Resp, p 10, 12.) But Loan Level Diligence refers to the process by which a “statistically significant sample” of mortgages “serving as collateral for a securitization” was reviewed for compliance. (Ex. D to Resp, ¶ 111.) Again, the subject mortgages were never collateral for a securitization, so Loan Level Diligence is not an issue.<sup>11</sup> Further, any such post-closing review would do nothing to stop the frauds in this case as the funds were already disbursed at closing.

Westminster next distorts the allegations by the United States regarding the “PaperSaver” program to suggest that it was *per se* negligent for the Bank to fund stated income loans.<sup>12</sup> Westminster’s arguments, however, are misleading at best. First and foremost, the United States alleged that the Bank did not fully disclose the nature of these loans to investors, not that the loans were inherently bad because income was not verified. (*Id.* ¶¶ 100-102.) And Neither Westminster nor First American expressed any desire to know what loan program the Bank’s loans were underwritten under. Further, Westminster misreads the United States’ allegations to support the argument that the Bank needed to obtain the tax returns of the borrowers for the Enid and Heron Ridge loans. (Resp, p 11.) This is not true. See *infra*. Quite simply, the mere fact that

---

<sup>11</sup> Westminster’s attempt to create a negative inference based on the fact that the Bank could not locate Lori Hostad[sic] more than five years after the loan closings is specious. (Resp, p 12.) The fact that Ms. Hofstad apparently requested a copy of the final HUD-1 on January 17, 2006 does nothing to support Westminster’s theory of a reckless lender funding loans it knows are bad.

<sup>12</sup> There is no evidence that the Enid and Heron Ridge loans were underwritten under the “PaperSaver” program. While the Bank did not verify the stated incomes for the borrowers in the Enid and Heron Ridge loans, it did verify their reported asserts with account statements and other documents.

these loans were stated income loans does not absolve Westminster of its contractual obligations under the closing instructions (or First American's obligations under the CPLs). See *Fifth Third Mortgage Co v Chicago Title Ins Co*, 758 F Supp 2d 476, 480 (SD. Ohio 2010) aff'd by 692 F3d 507 (CA 6, 2012).<sup>13</sup>

**B. Westminster's unfounded critiques of the Bank's underwriting do not alter Defendants' liability or provide just reason to deny the Bank's application for leave to appeal.**

Like Westminster's immaterial arguments regarding securities and stated income loans, its arguments concerning the Bank's specific underwriting activities for the Enid and Heron Ridge loans are misplaced.<sup>14</sup> First, the mere fact that the Bank performed underwriting activities prior to the actions by Westminster does not relieve Westminster of its duties to comply with the closing instructions or relieve First American of its duties to reimburse the Bank for the "fraud or dishonesty" of Westminster under the CPLs.<sup>15</sup> (See Resp p 5.) Moreover, Westminster's core defense that the Bank could have discovered the fraud before the loans were sent to closing (Resp, p 20) is nothing but an improper "but for" argument of causation. *Holton v A+ Ins Assocs*, 255 Mich App 318, 325-326; 661 NW2d 248 (2003) ("defendants' argument poses the classic 'but for' argument of causation, which in this context simply extends to further remote causes,

---

<sup>13</sup> Like the defendant in *Fifth Third*, neither Westminster nor First American conditioned their performance on the underwriting practices of the Bank. See *Fifth Third Mortgage Co v Chicago Title Ins Co*, 692 F3d 507, 514 (CA 6, 2012) ("Chicago Title denied coverage here based upon a condition—adequate underwriting practices—nowhere found or even intimated in the policy itself."). Westminster, however, suggests that the Bank was required to tell Westminster that the Bank's "underwriting rules had changed" – whatever that means. (Resp, p 13.)

<sup>14</sup> These arguments were first raised after the Circuit Court granted Westminster summary disposition, and have been used by Westminster and the Court of Appeals (the majority) as a post hoc justification for dismissing Westminster from this case.

<sup>15</sup> The closing instructions themselves make it clear that the Bank could revoke its loan commitments at any time if the Bank became aware of material variation of the facts. (App'x 4, ex 4.)

i.e., but for someone building the home, plaintiffs would not have suffered a loss”). Not only is this argument plainly insufficient to avoid liability under the closing instructions, it is irrelevant as to the Bank’s separate claims under the CPLs – which do not require proximate cause.

Under the CPLs, First American agreed to indemnify the Bank for loss that “arises out of” the “fraud or dishonesty” of Westminster. This requires a showing of causation that is significantly less than strict proximate causation. See 2 Windt, *Insurance Claims and Disputes* §11:22A (5th ed 2007) (explaining the broad interpretation of the term “arising out of”), attached as ex. 17.<sup>16</sup> Michigan courts have defined “arising out of” as a causal connection between two events of a sort that is more than incidental.” *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006). Quite simply, a lender does not need to show that the closing agent’s actions were the (or even a) proximate cause of the lender’s actual loss. See *Lawyers Title Ins Corp v New Freedom Mortgage Corp*, 285 Ga App 22, 33; 645 SE2d 536 (2007) (CPL language encompasses “almost any causal connection or relationship”) and *FDIC v Attorneys’ Title Insurance Fund, Inc.*, Case No 12-23599, p 8 (SD Fla Sept 3, 2014), attached as ex. 15.

First American must reimburse the Bank fully for its losses regardless of the Bank’s underwriting. See *JPMorgan Chase Bank, NA v First Am Title Ins Co*, 795 F Supp 2d 624, 629 (ED Mich 2011) aff’d 750 F3d 573 (6 CA, 2014); see also *Lawyers Title*, p 30 (title insurer was required to indemnify lender under CPL even if the loss was partially caused by lender’s own negligence). As one title insurance underwriter succinctly puts it: “The contributory negligence of the indemnitee (the addressee lender) of a closing protection letter may not be asserted as a defense to coverage where the issuing agent is alleged to have participated in a mortgage fraud scam.” Gosdin, *Title Insurance: A Comprehensive Overview* 89 (3rd ed, 2007). Courts have

---

<sup>16</sup> Exhibits 1-14 were attached to the Bank’s application and exhibits 15-16 were attached to the Bank’s reply to First American.

found similarly with regard to claims for breach of closing instructions. See *FDIC v First Am Title Ins Co*, 2011 US Dist LEXIS 94842 at \*29 (CD Cal August 24, 2011) (“[A]ny negligence of [the lender] in failing to investigate adequately [the borrower’s] background did not excuse First American’s breach.”) (opinion attached as ex. 18).

Further, under Michigan law, comparative fault is not a defense to breach of contract actions (whether based on closing instructions or CPLs). See *JPMorgan*, p 633 (citing *Nelson v Northwest. S&L Ass’n*, 146 Mich App 505, 381 NW2d 757, 759 (1985)); see also *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 21-22; 762 NW2d 911 (2009) (alleged negligence is irrelevant where there is no duty).<sup>17</sup> Even assuming the Court of Appeals had disagreed with the weight of case law on this issue, and found the Bank’s underwriting relevant to the Bank’s claims, multiple genuine issues of material fact still remained.

At the outset it is important to note that Westminster has no expert testimony to support its criticism of the Bank’s underwriting and almost all of the “facts” cited by Westminster were never placed before the Circuit Court. Further, Westminster’s account of the Bank’s underwriting practices borders on the hallucinatory. First, there is no evidence that the Bank did not follow its own underwriting guidelines. (Resp, p 20.) Westminster’s suggestion that stated income loans violated the Bank’s own guidelines because the program did not appear in the guidelines is plainly wrong. The Bank produced the stated income guidelines in this case – and these guidelines show unequivocally that the Bank’s guidelines did not require tax returns for self employed borrowers. (Ex. 19, BOA 001111, compare with Resp, p 11.) Further, Westminster states that the Bank did not “check” assets for stated income loans, but this too is inaccurate. The Bank received documentation to verify the reported assets, this documentation,

---

<sup>17</sup> Whether a lender should loan money to a person is a matter left to the bank in the exercise of its business judgment. *In re Holmes*, 414 BR 115, 125 (ED Mich 2009).

however, was fraudulent. (App'x 5, ex 11, Olson Tr 28:21-25). Westminster's arguments are precisely the same type of "blame the victim" allegations repeatedly rejected by case law. See *supra* and *Fifth Third Mortgage Co*, p 480 (Defendants claimed there were "red flags" as to stated income on the application and plaintiff should have received the borrowers tax returns from the IRS, but "[e]ven assuming these facts are true, the Court finds that they are not material because Plaintiff's underwriting policies are not relevant.")<sup>18</sup>

**C. The Court of Appeals disregarded the gatekeeper function of closing agents.**

Westminster has argued that closing agents serve a limited function (essentially ensuring only that there are no defects in title). (Resp, p 2.) But closing agents play a much more important role – acting as "the gatekeeper" for real estate transactions. *FDIC v Property Transfer Services, Inc*, 2013 US Dist LEXIS 144663 (SD Fla Oct 4, 2013), attached as ex 20. Closing agents "are the people who actually sit face-to-face with the parties at the closing table. It is in this setting that mortgage fraud is detected in many, many cases." (Ex 21.) As such, the Bank did not need to instruct Westminster to be "extra vigilant of potential fraud." (Resp, p 13.)<sup>19</sup> Westminster's job as closing agent was to look for mortgage fraud. The Court of Appeals' decision allows closing agents to avoid these important duties by holding that a closing agent's legal responsibility under closing instructions cannot exceed the obligations described in a CPL. (Resp, p 4). Westminster acknowledges, however, that contracts should be interpreted as written.

---

<sup>18</sup> See also *Silva v OneWest Bank, FSB*, 27 Mass L Rep 61 (Super Ct 2010) (finding no indication that lender knew of any misrepresentation regarding income, "willfully blinded itself to mortgage brokers who brought loans to it that knowingly inflated the borrower's income, or encouraged and invited borrowers to submit false information in loan applications"); *In re Holmes*, 414 BR 115, 125-126 (ED Mich 2009) (rejecting debtor's argument that debt was not dischargeable because lender "could have" taken additional steps to discover the fraud).

<sup>19</sup> Regardless, it is undisputed that First American had in fact instructed Westminster to be extra vigilant of potential fraud in double escrows and property flips. (App'x 5, ex 1.) Westminster claims that flips do not suggest illegality. (Resp, p 19.) This argument ignores First American's alert and the testimony of First American. (App'x 5, ex 6, O'Connor Tr 110:20- 25.)

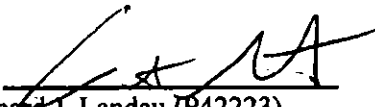
(Resp, p 21.) As such, the separate closing instructions and CPL contracts should be interpreted as written (as separate contracts), not based on an unsupported and illogical argument that a CPL issued by a title insurer somehow voids additional instructions found in a separate contract between the lender and closing agent.

**D. There are genuine issues of material fact as to whether Westminster (1) failed to comply with the Bank's closing instructions and (2) closed the transactions with "fraud or dishonesty."**

The Bank's closing instructions required (1) all payees to be listed on the HUD-1; (2) the HUD-1 to be approved prior to closing; and (3) third party contributions (which plainly include second mortgagees) be limited to a certain amount. Westminster did not follow these instructions. Westminster argues that its failures are excusable based on the conduct of the Bank, but at the very least, genuine issues of material fact exist on this issue. See *supra*. Further, as detailed in the Bank's reply to First American, there are genuine issues of material fact as to whether Westminster committed "fraud or dishonesty" as those terms were interpreted by the Court of Appeals in First American's CPLs.<sup>20</sup>

Respectfully submitted,

**RJ LANDAU PARTNERS PLLC**

By:   
Richard J. Landau (P42223)  
Christopher A. Merritt (P70924)  
Attorneys for Bank of America, N.A.  
5340 Plymouth Road, Suite 200  
Ann Arbor, MI 48105  
(734) 865-1585

September 8, 2014

---

<sup>20</sup> Westminster does not object to the Court of Appeals' interpretation of "fraud or dishonesty."